No. 85-782

In the Supreme Court of the United States

OCTOBER TERM, 1986

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Pursuant to Rule 35.6 of the Rules of this Court, the Solicitor General, on behalf of the petitioner, moves for leave to file the annexed post-argument memorandum.

This case was argued on October 7, 1986. Since that time, Congress has passed the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (Nov. 6, 1986). That Act, among other things, provides an avenue for legalization of the status of certain aliens who have continuously resided unlawfully in the United States since January 1, 1982. Re-

spondent's unlawful residence in this country began on October 1, 1979, and she therefore may be eligible to pursue the procedures contemplated by the new legislation. Because the Court may be concerned about whether the new legislation renders this case moot, the annexed memorandum describes that legislation and discusses its effect on the justiciability of this case.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

(5)

TABLE OF AUTHORITIES

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POST-ARGUMENT MEMORANDUM FOR THE PETITIONER

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1. Respondent entered the United States on June 25, 1979, as a nonimmigrant visitor authorized to remain until September 30, 1979. She stayed in this country beyond that date without permission. In deportation proceedings, she requested asylum and withholding of deportation pursuant to Sections 208(a) and 243(h), respectively, of the Immigration and Nationality Act of 1952 (the Act), 8 U.S.C. 1158 (a), 1253(h). The immigration judge denied both forms of relief, holding that the eligibility standard

for asylum and the "clear probability of persecution" required for withholding of deportation were equivalent to one another, and that respondent had not met that standard. The Board of Immigration Appeals dismissed an appeal, but the court of appeals reversed and remanded, holding that the showing necessary for eligibility for asylum was lower than that required for withholding of deportation. This Court granted our petition for a writ of certiorari to determine whether the two standards are equivalent.[1]

2. On November 6, 1986 (thirty days after the argument in this case), the President signed into law the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (*reprinted in* 132 Cong. Rec. H10068-H10091 (daily ed. Oct. 14, 1986)). The new statute does not amend the asylum and withholding-of-deportation provisions of the Act or otherwise bear on their interpretation. There is therefore nothing in the new legislation that bears substantively on the question presented in this case. The legislation does, however, make available to certain aliens in the United States a new means by which to legalize their status.

Section 201(a) of the recent statute adds a new Section 245A to the Act. Section 245A(a) requires the Attorney General to adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien (1) makes a timely application for adjustment of status, (2) entered the United

[1] There is a conflict in the circuits on the issue presented, as discussed in our petition and in the various briefs on the merits. Since the argument, another court of appeals has cited, and agreed with, the decision below in this case. See *Carcamo-Flores* v. *INS*, No. 86-4062 (2d Cir. Nov. 6, 1986), slip op. 8.

States before January 1, 1982, and has resided continuously in the United States in an unlawful status since that date, (3) has been continuously physically present in the United States since the date of enactment of Section 245A, and (4) meets (or the Attorney General waives) the conditions for admissibility described in Section 245A(a)(4) and elsewhere in the Act.[2] Section 245A(b), among other things, gen-

[2] For example, the alien must not have been convicted of a felony or of three or more misdemeanors committed in the United States (Section 245A(a)(4)(B)), must not have assisted in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion (Section 245A(a)(4)(C)), and must be registered or registering for the draft, if required to do so (Section 245A(a)(4)(D)).

The alien will not be admissible, and the Attorney General may not waive the ground of exclusion, if the alien has been convicted of a crime of moral turpitude or has been convicted of two or more nonpolitical offenses resulting in a sentence of five years or more (Section 245A(d)(2)(B)(ii)(I) and Section 212(a)(9) and (10), 8 U.S.C. 1182(a)(9) and (10)); if the alien is likely to become a public charge, is not eligible for certain Social Security benefits, and does not have a history of self-supporting employment in the United States (Section 245A(d)(2)(B)(ii)(II) and (iii) and Section 212(a)(15)); if the alien has certain drug-related convictions or is a known trafficker in illegal drugs (Section 245A(d)(2)(B)(ii)(III) and Section 212(a)(23)); if the alien meets certain statutory definitions relating to threats to national security and to membership in certain organizations (Section 245A(d)(2)(B)(ii)(IV) and Section 212(a)(27)-(29)); or if the alien assisted in the Nazi persecution (Section 245A(d)(2)(B)(ii)(V) and Section 212(a)(33)).

The alien will not be admissible, but the Attorney General may waive the ground of exclusion (Section 245A(a)(4)(A) and (d)(2)(B)(i)), if the alien falls within certain other categories, such as the mentally retarded (Section 212(a)(1)), the insane or similarly impaired (Section

erally requires the Attorney General, on application by the alien, to adjust the status, to that of a permanent resident (see Section 245 of the Act, 8 U.S.C. 1255), of an alien who has been granted lawful temporary resident status under Section 245A(a) and has been in that status at least 18 months but not more than 30 months at the time of application, provided that the alien meets certain conditions similar to the admissibility conditions described above and demonstrates specified basic citizenship skills. Once the alien has achieved permanent resident status, he or she may achieve citizenship on the same basis as any other permanent resident (see generally Section 316 of the Act, 8 U.S.C. 1427).

The legalization program embodied in Section 245A(a) and (b) is neither self-executing nor immediately effective. Section 245A(g)(1) generally empowers the Attorney General, after consultation with the Senate and House Committees on the Judiciary, to implement the Section by regulation, and Section 245A(a)(1)(A) specifically authorizes the Attorney General to designate a date, not later than 180 days after the date of enactment of Section 245A, on which the 12-month "application period" will begin. Until such a date is set (and arrives), no alien will be entitled to the benefits of Section 245(a) and (b). Before that date, however, an alien

212(a)(2)-(4)), drug addicts and alcoholics (Section 212(a)(5)), those afflicted with contagious disease (Section 212(a)(6)), professional beggars (Section 212(a)(8)), polygamists (Section 212(a)(11)), prostitutes (Section 212(a)(12)), stowaways (Section 212(a)(18)), those who have sought to enter the United States by fraud (Section 212(a)(19)), and those who have knowingly and for gain assisted any other alien to enter or try to enter the United States in violation of law (Section 212(a)(31)).

who has been apprehended and who can establish a prima facie case of eligibility for adjustment of status under Section 245A(a) is entitled under Section 245A(e)(1) to an automatic stay of deportation until the alien files an application for adjustment of status within the first 30 days of the application period. Such an alien shall also be authorized to engage in employment in the United States. Once the alien does file an application for adjustment of status, and presents a prima facie case of eligibility, then under Section 245A(e)(2) the automatic stay of deportation and the work authorization continue until a final determination on the application is made.[3]

3. Because respondent's unlawful residence in this country began before January 1, 1982, she meets one criterion for eligibility for legalization, and if she files a timely application she may well be able to meet her burden of proving that she meets the other subsection (a) criteria as well. Therefore, it may well be that respondent could eventually achieve a lawful status in this country and permanent residency under the new legalization program. Neither respondent nor any other alien, however, is yet eligible to receive, or even to file for, any perma-

[3] In addition to these provisions, Section 302(a) of the new Immigration Reform and Control Act adds a new Section 210 to the Act. Section 210 provides a legalization procedure, similar to that in Section 245A, for certain aliens who resided and performed "seasonal agricultural services" in the United States for at least 90 days during the 12-month period ending May 1, 1986. Because we have no basis to believe that respondent could qualify for legalization under Section 210, we limit our discussion in this memorandum to Section 245A.

nent benefits under the legalization program. For that reason, the mere passage of the new legislation has not rendered this case moot.

Even if respondent files an application under Section 245A while this case is still pending, that will not moot the case unless respondent also chooses to discontinue her asylum application. If respondent were to prevail on her claim of entitlement to asylum, she would be free from deportation for as long as she remained an asylee.[4] She would become eligible, subject to the quota and the eligibility criteria in Section 209(b) of the Act, for adjustment of status to that of a permanent resident one year after the grant of asylum. Particularly because the one-year minimum waiting period for asylees to become permanent residents is shorter than the corresponding 18-month waiting period for aliens granted legalization of status by the new Section 245A(a), and because respondent will not be eligible for legalization until the application period begins, asylum (if granted) could provide respondent a quicker route to permanent residency than legalization. In addition, respondent might be eligible for public welfare

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[4] Under the current regulations, grants of asylum by the immigration judge last for one year (8 C.F.R. 208.10(e)), but if the asylee remains in this country the status may and ordinarily will be renewed, in the absence of changed circumstances, until the asylee becomes a permanent resident under Section 209(b) of the Act, 8 U.S.C. 1159(b). Before the asylee achieves permanent resident status, however, his or her asylum status may be terminated on the ground that changed circumstances in the relevant foreign country eliminate the need for asylum, that the asylee poses a danger to the community of the United States, or that the asylee was not in fact eligible for asylum (8 C.F.R. 208.15(a)).

benefits at some point after a grant of asylum, whereas aliens granted lawful temporary resident status under Section 245A(a) are denied the right to certain public welfare benefits for five years after the grant of status (Section 245A(h)). For these reasons, it may be advantageous to respondent to continue to pursue her asylum application even if she eventually chooses to seek legalization under Section 245A.

In sum, as long as respondent continues to pursue her asylum application, we believe that there will remain a justiciable controversy between the parties. *INS* v. *Chadha*, 462 U.S. 919, 936-937 (1983).

4. The issue in this case remains basically no less important than it was when the Court granted certiorari. Although many aliens who unlawfully entered or remained in the United States before 1982 may now choose to seek legalization rather than asylum, others undoubtedly will continue to seek asylum for the reasons discussed above. In addition, the legalization option is unavailable to the large number of aliens whose unlawful presence in this country began (or will begin) in 1982 or later, except for those agricultural workers who qualify for legalization under new Section 210 (see note 3, *supra*). Aliens who are ineligible for legalization under Sections 245A and 210 can be expected to continue to press pending claims for asylum and to institute new claims for asylum. The asylum caseload of the agency and the courts, although it may shrink temporarily, will continue to be large, and it is important that this Court determine whether the asylum eligibility standard adopted by the agency is the correct one.

In sum, the new law provides no reason for the Court to refrain from deciding the case on the merits.

CHARLES FRIED
Solicitor General

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